143 (6)

No. 09-297

Supreme Court, U.S.
FILED
OCT 23 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM 2009

FORD MOTOR COMPANY,
Petitioner,

v.

BENETTA BUELL-WILSON AND BARRY S. WILSON,
Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION

JEROME B. FALK, JR.
Counsel of Record
STEVEN L. MAYER
JOHN P. DUCHEMIN
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Fl.
San Francisco, California 94111
Telephone: 415/434-1600
Facsimile: 415/217-5910

DENNIS A. SCHOVILLE
LOUIS G. ARNELL
SCHOVILLE & ARNELL, LLP
2404 Broadway
San Diego, California 92102
Telephone: 619/232-9901
Facsimile: 619/232-9904

Attorneys For Respondents

TABLE OF CONTENTS

		Page
STATEMENT OF THE CASE		1
REASONS FOR DENYING THE PETITION		4
I.	FORD DID NOT RAISE THE ISSUE PRESENTED AT EVERY STAGE OF THE STATE PROCEEDINGS.	5
II.	FORD'S "VAGUENESS/FAIR NOTICE" CHALLENGE DOES NOT MERIT CERTIORARI.	11
A.	California Law Gave Ford Ample Notice Of The Circumstances Under Which Punitive Damages Could Be Awarded.	13
B.	Ford Does Not Make (And Has Not Preserved) A Substantive Due Process Argument, And *Amici* Therefore May Not Do So.	16
C.	Ford's "Vagueness/Fair Notice" Claim Has No Support In This Court's Cases.	18
D.	There Is No Conflict In The Cases.	22
CONCLUSION		29
APPENDIX:	Excerpts of Appellant's Petition for Review in the Supreme Court of California, filed August 28, 2006	1a

TABLE OF AUTHORITIES

	Page(s)
Cases	
Adams v. Robertson, 520 U.S. 83 (1997)	8, 9
B&B Insulation, Inc. v. Occupational Safety & Health Review Comm'n, 583 F.2d 1364 (5th Cir. 1978)	26, 27, 28
Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988)	7
Barber v. Jefferson County Racing Ass'n, 960 So. 2d 599 (Ala. 2006), *cert. denied*, 551 U.S. 1131 (2007)	25
Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994)	18
Beck v. Washington, 369 U.S. 541 (1962)	6
Bertero v. Nat'l Gen'l Corp., 13 Cal. 3d 43 (1974)	23, 24
BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996)	17
Boynton v. Virginia, 364 U.S. 454 (1960)	6
Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth, 556 F.3d 1021 (9th Cir. 2009)	26
City of Lincoln v. Barringer, 102 Cal. App. 4th 1211 (2002)	6
Clark v. Arizona, 548 U.S. 735 (2006)	8
Colautti v. Franklin, 439 U.S. 379 (1979)	19

TABLE OF AUTHORITIES

	Page(s)
Coll. Hosp., Inc. v. Superior Court, 8 Cal. 4th 704 (1994)	13
Connally v. Gen. Constr. Co., 269 U.S. 385 (1926)	20
Ebbetts Pass Forest Watch v. Cal. Dep't of Forestry & Fire Prot., 43 Cal. 4th 936 (2008)	5
Egan v. Mut. of Omaha Ins. Co., 24 Cal. 3d 809 (1979)	24
Evans v. Centerstone Dev. Co., 134 Cal. App. 4th 151 (2005)	9
Golden Day Sch., Inc. v. Dep't of Educ., 69 Cal. App. 4th 681 (1999)	6
Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757 (1981)	12, 14, 15, 22
Haggblom v. City of Dillingham, 191 P.3d 991 (Alaska 2008)	26
Hasson v. Ford Motor Co., 32 Cal. 3d 388 (1982)	14, 24
Heavenly Valley v. El Dorado County Bd. of Equalization, 84 Cal. App. 4th 1323 (2000)	6
Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)	18
Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984)	24, 25
People v. Villa, 45 Cal. 4th 1063 (2009)	5

TABLE OF AUTHORITIES

	Page(s)
Philip Morris USA v. Williams, 549 U.S. 346 (2007)	3, 10, 17
Redrup v. New York, 386 U.S. 767 (1967)	6
Riegel v. Medtronic, Inc., 552 U.S. 312, 128 S. Ct. 999 (2008)	5
Roberts v. Lomanto, 112 Cal. App. 4th 1553 (2003)	9
Roe v. McDonald's Corp., 129 Cal. App. 4th 1107 (2005)	6
Roman Catholic Bishop v. Superior Court, 128 Cal. App. 4th 1155 (2005)	19
Romo v. Ford Motor Co., 113 Cal. App. 4th 738 (2003)	15
S&H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n, 659 F.2d 1273 (5th Cir. 1981)	26, 27, 28
Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007)	20, 21
Sierra Club v. City of Orange, 163 Cal. App. 4th 523 (2008)	6
Smith v. Wade, 461 U.S. 30 (1983)	18, 19, 20
State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)	2, 3, 8
State v. Thirteenth Judicial Dist. Court, 208 P.3d 408 (Mont. 2009)	26

TABLE OF AUTHORITIES

	Page(s)
Stoner v. Nash Finch, Inc., 446 N.W.2d 747 (N.D. 1989)	24, 25
Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), *overruled on other grounds*, *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985)	24, 25
Sw. Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915)	20
Taylor v. Illinois, 484 U.S. 400 (1988)	7
Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689 (1967)	14
TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993)	18
Unilogic, Inc. v. Burroughs Corp., 10 Cal. App. 4th 612 (1992)	10
Union Mut. Life Ins. Co. v. Kirchoff, 169 U.S. 103 (1898)	11
United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981)	16
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)	18, 19
Webb v. Webb, 451 U.S. 493 (1981)	10
Wilson v. 21st Century Ins. Co., 42 Cal. 4th 713 (2007)	5

TABLE OF AUTHORITIES

	Page(s)
Statutes and Regulations	
49 U.S.C. §30103(e)	15
29 C.F.R. §1926.28(a)	26
S. Ct. R. 14.1(a)	5, 6
CAL. CIV. CODE	
§3294(a)	13
§3294(c)(1)	13
§3294(c)(2)	13
CAL. R. CT.	
8.204(a)(1)(B)	6
8.504(a)	6
8.504(b)(1)	5
8.516(b)(2)	6
8.520(b)(2)	5
8.520(b)(3)	5

STATEMENT OF THE CASE

Ford's Petition offers a one-sided account of the facts and evidence. The Court of Appeal's opinion fairly summarizes the events that led to this litigation, including the Wilsons' catastrophic injuries, and the evidence presented at trial. Pet. App. 6a-17a.

The Wilsons sued Ford after Mrs. Wilson was crushed and rendered paraplegic when her Ford Explorer rolled over and the roof failed. The jury awarded Mrs. Wilson $109.6 million, and Mr. Wilson $13 million, in compensatory damages. *Id.* at 17a, 33a. It also awarded $246 million in punitive damages. *Id.* at 18a. The trial court reduced the compensatory damages to $70 million for Mrs. Wilson and $5 million for Mr. Wilson, and the punitive damages to $75 million. *Id.* at 19a-20a.

The Court of Appeal affirmed the finding of liability but further reduced both compensatory and punitive damages. Noting that Ford had not challenged the sufficiency of the evidence (*id.* at 11a), the court described the history of the Explorer's design. Ford based the Explorer on a prior SUV (the Bronco II) with a terrible history of instability and susceptibility to rollovers. *Id.* at 10a-13a. Although Ford knew of these problems, it retained critical Bronco II design elements bearing on stability (a narrow track width and high engine mount and center of gravity) and carried over a high percentage of parts from the Bronco II, while rebranding it as the Explorer. *Id.* at 12a-13a. Because making the necessary design changes would have delayed the Explorer's release date, Ford management rejected repeated requests by its engineers to increase the vehicle's track width and lower its center of gravity, thereby preserving a lethal feature of the Bronco II. *Id.* at 12a-14a. For cosmetic reasons, management also increased the Explorer's tire size, exacerbating the vehicle's instability. *Id.* at 14a. In subsequent years, as it modified the Explorer's design, Ford management again declined for

economic reasons to improve the Explorer's stability. *Id.* at 15a-16a.

The Explorer was not just unstable; it also had a weak roof structure prone to crush in a rollover. *Id.* at 11a, 16a. Rollovers in vehicles with sturdy roofs are relatively nonviolent events for passengers who are properly restrained (as was Mrs. Wilson). *Id.* at 16a. Ford could have significantly strengthened the roof for about $20 per vehicle. *Id.*

The Court of Appeal upheld Mr. Wilson's $5 million compensatory damage award and Mrs. Wilson's $4.6 million economic damage award, but reduced her noneconomic damages to $18 million. *Id.* at 43a-45a, 73a, 119a. The Petition does not challenge the resultant $27.6 million award of compensatory damages.

With respect to punitive damages, the court found that Ford had known that the vehicle was dangerously unstable and prone to rollover in normal driving conditions; had known that the roof structure was weak and prone to collapse in a rollover; and had known of technologically and economically feasible ways to stabilize the vehicle and strengthen its roof but chose for financial reasons not to do so. *Id.* at 52a-53a. The court also found that Ford had "evinced a reckless disregard for the safety of its customers" and had engaged in "'a pattern of deficient design regarding safety in favor of increased financial returns and was the result of the conscious disregard of Ford executives.'" *Id.* at 68a-69a. It added that "Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management, knowing the unreasonable risk of harm posed to consumers, as opposed to a mere accident." *Id.* at 69a. Consequently, it concluded that "the reprehensibility of Ford's conduct was high." *Id.* at 67a; *accord*, *id.* at 71a.

Nevertheless, the court reduced the punitive damages to $55 million, a ratio of essentially 2:1. *Id.* at 73a. It noted this Court's comment in *State Farm* that "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal

to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Id.* at 71a (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). In this case, however, it concluded "that a two-to-one ratio is warranted because the degree of Ford's reprehensibility is also high." *Id.* It added that "[a]n award exceeding a two-to-one ratio would exceed the constitutional maximum . . . under the facts of this case." *Id.* at 73a.

Ford filed a Petition for Review in the California Supreme Court which was summarily denied. Pet. 7. This Court then granted certiorari and remanded the case to the California Court of Appeal for reconsideration in light of *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) ("*Williams I*"). 550 U.S. 931 (2007). On remand, the Court of Appeal held that Ford had failed to preserve the third-party harm issue raised in *Williams*, and had therefore forfeited its right to assert it, in three distinct ways: (1) Ford failed to propose a legally correct instruction dealing with the issue of third-party harm (Pet. App. 77a-92a); (2) on appeal, Ford failed to raise any issue regarding the failure to give a third-party harm instruction (*id.* at 95a-98a); and (3) it likewise failed to raise that issue in its Petition for Review to the California Supreme Court. *Id.* Ford's Petition does not attack this aspect of the Court of Appeal's opinion, or otherwise raise the third-party harm issue. Accordingly, Ford has abandoned the issue that was the subject of the Court's prior GVR order.

The California Supreme Court initially granted Ford's second Petition for Review but deferred briefing or a decision pending disposition of the second *Philip Morris USA v. Williams* case. When this Court dismissed the writ in *Williams II* as improvidently granted (129 S. Ct. 1436 (2009)), the California Supreme Court dismissed review. Pet. App. 120a.

REASONS FOR DENYING THE PETITION

Ford has not challenged the judgment insofar as it awards compensatory damages for marketing a defective and dangerous product. Instead, the Petition targets only the punitive damages award, and rests on only a single ground: the asserted vagueness of California's punitive damages law as applied to the particular facts of this case.

The Petition should be denied. Once again, Ford seeks to raise an issue that it failed to preserve in the California courts: although the original Court of Appeal opinion rejected Ford's vagueness contentions, Ford failed to properly present that issue in its original Petition for Review to the California Supreme Court. Ford claims that it preserved the vagueness/fair notice issue by mentioning it in a footnote. However, California law requires that an issue be raised in the text of the brief, under an appropriate topic heading; issues raised only in a footnote are disregarded. Moreover, to raise an issue for discretionary review in the California Supreme Court, it must be included in a concise statement of the issues presented. Ford did not comply with any of these requirements. And while it subsequently attempted to resurrect that forfeited issue by raising it on remand to the Court of Appeal, that court properly held that the only issue before it as a result of this Court's GVR order was the third-party harm issue raised by *Williams I* and now abandoned by Ford. *See* Part I, *infra*.

In any event, the Court of Appeal's rejection of Ford's as-applied vagueness argument presents no issue meriting certiorari. The jury and the Court of Appeal found that Ford had knowingly sold a dangerous and defective vehicle that could have been made safe for a modest amount. California law gave clear notice by statute—and in decisional law (including several cases involving Ford)—that such conduct could subject a manufacturer to punitive damages. Ford identifies no conflict between the decision below and any decision of this Court, a federal Court of Appeals, or the highest court of a

state. Indeed, three decisions of this Court have rejected similar vagueness challenges to punitive damages awards. *See* Part II, *infra*. Certiorari should be denied.

I.

FORD DID NOT RAISE THE ISSUE PRESENTED AT EVERY STAGE OF THE STATE PROCEEDINGS.

The vagueness issue Ford now seeks to raise was presented at trial and in the Court of Appeal. Pet. 5-7. However, Ford's representation that it "again rais[ed] its as-applied vagueness challenge" in its original Petition for Review to the California Supreme Court (*id.* at 7) is inaccurate. Its failure to do so forfeited the issue as a matter of California law, and nothing Ford did thereafter could revive it.

Under well-established California rules regarding petitions for discretionary review in the Supreme Court, a Petition for Review "must begin with a concise, nonargumentative statement of the issues presented for review." CAL. R. CT. 8.504(b)(1); *compare* S. CT. R. 14.1(a) (imposing similar requirement on petitions for writs of certiorari). The California Supreme Court ordinarily does not consider issues not expressly raised or fairly included therein. CAL. R. CT. 8.520(b)(2), (3); *see, e.g.*, *People v. Villa*, 45 Cal. 4th 1063, 1076 (2009); *Ebbetts Pass Forest Watch v. California Dep't of Forestry & Fire Prot.*, 43 Cal. 4th 936, 951 n.5 (2008); *Wilson v. 21st Century Ins. Co.*, 42 Cal. 4th 713, 726 (2007); *compare, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 128 S. Ct. 999, 1011 (2008) (similar rule in this Court).

Ford does not even claim to have met this requirement, and for good reason. Its Petition for Review identified three "Issues Presented" on which review was sought. *A federal vagueness/"fair notice" claim was not among them.* *See* Resp. App. 4a. Nor was the issue "fairly included" in the "Issues Presented." Accordingly, that issue was not properly

presented to the highest court of California. *See Beck v. Washington*, 369 U.S. 541, 553 (1962).[1]

Moreover, California appellate rules also require that all briefs "[s]tate each point under a separate heading or subheading summarizing the point." CAL. R. CT. 8.204(a)(1)(B).[2] This rule applies to Petitions for Review. *Id.* RULE 8.504(a). Ford did not meet this requirement either. Neither the Table of Contents nor the section headings in the Petition for Review refer to the issue of vagueness or fair notice. Resp. App. 2a-3a. For this reason as well, Ford did not properly present this issue to California's highest court in its first Petition for Review.

Although these deficiencies were known to Ford (Plaintiffs drew them to the Court's attention in opposition to Ford's earlier certiorari petition (Brief in Opposition 5-6, *Ford Motor Co. v. Buell-Wilson*, No. 06-1068 (U.S. Apr. 3, 2007))), Ford's Petition does not mention them. Instead, it cites one

---

[1]Of course, the California Supreme Court has the *power* to decide issues that were neither raised in the Petition for Review nor "fairly included" therein. CAL. R. CT. 8.516(b)(2). But that proves nothing. This Court's rules similarly provide that only questions presented by a petition for writ of certiorari or "fairly included therein[] will be considered by the Court." S. CT. R. 14.1(a). Nevertheless, the Court sometimes decides issues that are not presented or fairly included in the petition. *See, e.g.*, *Redrup v. New York*, 386 U.S. 767, 769-71 (1967); *Boynton v. Virginia*, 364 U.S. 454, 457 (1960). This occasional practice has never prevented the Court from enforcing Rule 14.1(a) in the vast majority of cases. Similarly, the California Supreme Court's power to consider issues that are not presented in a Petition for Review does not prevent that Court or this Court from enforcing the rule requiring parties seeking discretionary review to identify the issues as to which review is sought.

[2]Cases applying this rule are legion. *See, e.g.*, *Sierra Club v. City of Orange*, 163 Cal. App. 4th 523, 542 (2008); *Roe v. McDonald's Corp.*, 129 Cal. App. 4th 1107, 1114 (2005); *City of Lincoln v. Barringer*, 102 Cal. App. 4th 1211, 1228 (2002); *Heavenly Valley v. El Dorado County Bd. of Equalization*, 84 Cal. App. 4th 1323, 1345 n.17 (2000); *Golden Day Sch., Inc. v. Dep't of Educ.*, 69 Cal. App. 4th 681, 695 n.9 (1999).

oblique statement in the Introduction to the Petition for Review, as well as a footnote. Pet. 5. However, in light of the well-settled California rules requiring that issues raised in a Petition for Review be identified both in the "Issues Presented" and in the argument headings contained in the body of the Petition, the few sentences cited by Ford were insufficient to raise the vagueness/fair notice issue presented in the current Petition.[3]

Moreover, what Ford said in the Introduction to the Petition was insufficient to raise vagueness as an issue of federal due process. In that Introduction, Ford addressed the three issues that it had identified in the Issues Presented portion of the Petition. *See* Resp. App. 4a. Its discussion of the second of these issues contended that—as a matter of *California statutory law*—punitive damages could not be awarded because (in Ford's view) the Court of Appeal's opinion authorized juries "to deem a manufacturer's design

---

[3]In the reply brief filed in support of its prior petition, Ford also relied on the statement in its Petition for Review that the California Court of Appeal's decision imposes

> a vague regime that will permit tens of millions of dollars of punishments to be imposed if a jury deems a manufacturer's conduct "despicable" on the strength of nothing more than a finding that, as will almost always be the case, the product might possibly have been made "safer" if more money had been spent in making it. That is neither constitutional nor rational. Review is necessary to conform California's product liability and punitive damage law to reason, common sense, and the United States Constitution. (Resp. App. 5a (*quoted at* Reply Brief for Petitioner 2))

Ford's decision not to rely on this passage in its present petition is understandable. "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *cf. Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988).

decisions malicious, and impose severe punishment, even where undisputed objective indicators . . . affirmatively refute malice as a matter of law." *Id.* at 7a. Ford then asserted that

> [t]his ruling contradicts California law, decisions from other jurisdictions, and due process. This issue is especially important because punitive damages "pose an acute danger of arbitrary deprivation of property." (*State Farm Mut. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-18 . . .) (*Id.* at 7a)

This unexplained, fleeting reference to due process and the quote from *Campbell* in the middle of a state law argument was insufficient to raise the vagueness/fair notice issue that Ford now presents. The reference to due process did not invoke the federal constitution; nor did it mention the void-for-vagueness doctrine in any of the customary ways—*i.e.*, by using the terms "void for vagueness," "unconstitutionally vague," "unconstitutionally uncertain" or "lack of fair notice." Nor did this passage attempt to explain what was vague or uncertain about California's punitive damages regime, let alone contend that California's punitive damages statute was unconstitutionally vague either on its face or as applied (a proposition that, as shown below, would have taken a great deal of explaining). That claim is therefore barred. *See Clark v. Arizona*, 548 U.S. 735, 762-65 (2006).[4]

These oblique statements in the Petition for Review contrast sharply with the vagueness argument Ford had presented earlier in the litigation. As the Petition correctly represents, Ford raised the vagueness issue at trial (Pet. 5) and

---

[4]The cite to *Campbell* did not put the California Supreme Court on notice that a federal claim of vagueness was being asserted. "The discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" *Adams v. Robertson*, 520 U.S. 83, 88 (1997) (citation omitted).

with crystal clarity (and at considerable length) presented it to the Court of Appeal. Pet. 6.[5] Surely if Ford *had* intended to raise the issue again in the California Supreme Court, its lawyers would have done so just as plainly. And if they had, Plaintiffs' Answer to the Petition for Review would have responded accordingly—or risked a withering comment in Ford's reply. In fact, however, Plaintiffs took note of Ford's failure to assert vagueness as an issue for review, and therefore did not address vagueness/fair notice in their Answer to the Petition for Review. *See* Answer to Petition for Review, *Buell-Wilson v. Ford Motor Co.*, No. S146150 (Cal. S. Ct. Sept. 18, 2006). Moreover, Ford's reply neither mentioned the omission nor made any mention of the vagueness issue itself. *See* Reply to Answer to Petition for Review (Oct. 2, 2006). Given these omissions, the California Supreme Court had no reason to believe that Ford sought review on a federal issue of vagueness or fair notice. *See Adams v. Robertson*, 520 U.S. 83, 89 (1997) (constitutional issue waived where, *inter alia*, petitioner failed to discuss issue in state supreme court reply brief even though it had been raised by respondent).

Nor is the footnote cited by Ford (which was buried at the end of the Petition for Review) sufficient to raise the vagueness/fair notice issue. Numerous California decisions apply the "heading rule" discussed above, and hold that presentation of an issue in a footnote is insufficient under California law to bring an issue to an appellate court's attention. *See, e.g., Evans v. Centerstone Dev. Co.*, 134 Cal. App. 4th 151, 160 (2005) ("We do not have to consider issues discussed only in a footnote") (citation omitted); *Roberts v. Lomanto*, 112 Cal. App. 4th 1553, 1562 (2003) (same);

---

[5]Ford's first Appellants' Opening Brief devoted more than six pages to an as-applied vagueness argument. *See* App. Opening Brf. 56-63, *Buell-Wilson v. Ford Motor Co.*, No. D045154 (Cal. Ct. App. July 8, 2005).

Unilogic, Inc. v. Burroughs Corp., 10 Cal. App. 4th 612, 624 n.2 (1992) (same).

For all these reasons, the only issue Ford presents in its petition was not presented to the California Supreme Court "at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981). Because Ford failed to preserve it in its first Petition for Review, the vagueness issue was forfeited.

Nothing Ford did thereafter could resuscitate this issue. After the California Supreme Court denied review, Ford filed a petition for certiorari that attempted to raise the issue of vagueness. Petition for Writ of Certiorari 9-22, *Ford Motor Co. v. Buell-Wilson*, No. 06-1068 (U.S. Jan. 30, 2007). Plaintiffs filed a brief in opposition pointing out that the issue had not been preserved. Brf. in Opp. 4-6 (Apr. 3, 2007). The Court subsequently granted the petition, vacated and remanded for reconsideration in light of *Williams I*. 550 U.S. 931 (2007). On remand, the Court of Appeal held that the "third party harm"/failure-to-instruct issue that was the subject of this Court's GVR order had been forfeited by Ford because (1) it did not propose a legally correct third party harm instruction at trial; (2) did not raise the failure-to-instruct issue in its appeal to the Court of Appeal; and (3) did not raise that issue in its Petition for Review to the Supreme Court. Pet. App. 74a, 77a-98a.

In Ford's briefing on remand, Ford attempted to revive the vagueness issue. The Court of Appeal held that Ford could not do so in light of the limited scope of this Court's remand order:

> [W]e conclude *Philip Morris* does not require that we change any of the holdings in our original opinion, and thus, with some changes, "we reiterate [our original opinion] in its entirety."
>
> * * * *
>
> We . . . decline Ford's (and amici curiaes') request that we reconsider our original holdings on the . . .

> issues related to the punitive damages award other than whether that award improperly punished Ford for harm to third parties. The United States Supreme Court's direction to this court was to reconsider our original decision "in light of *Philip Morris*." The only issue decided by *Philip Morris* was whether and when third party harm could be considered in imposing punitive damages. Based on our analysis of *Philip Morris*, our review of *Buell-Wilson I*, and the proceedings in the trial court, we conclude that nothing in *Philip Morris* requires us to reconsider the remainder of our original decision. (Pet. App. 3a, 52a (citations omitted))

The Court of Appeal thereupon republished without substantive change its prior opinion on a number of issues, including the issue of vagueness/fair notice. Pet. App. 61a-62a.

Because the vagueness issue had been forfeited, Ford's attempt to reinstate the issue by presenting it in its second Petition for Review came too late. The issue is therefore procedurally barred. *See Union Mut. Life Ins. Co. v. Kirchoff*, 169 U.S. 103 (1898).

II.

FORD'S "VAGUENESS/FAIR NOTICE" CHALLENGE DOES NOT MERIT CERTIORARI.

Even if it had not been waived by Ford's failure to raise the issue in its first Petition for Review in the California Supreme Court, Ford's "vagueness/fair notice" claim would not warrant certiorari. As shown in Section II(C), *infra*, the decision below does not conflict with any decision of this Court. Nor does it conflict with decisions of other courts. Section II(D), *infra*.

Nor does Ford present a substantial federal claim. It asserts that it lacked sufficient notice that it could be liable for punitive damages in circumstances such as those presented in this case.[6] But Ford was on notice, long before it designed the Explorer, that knowingly designing and selling a vehicle that exposes consumers to risk of severe injury or death, when the defect could be corrected at minimal cost, could result in punitive damages liability. Indeed, nearly thirty years ago a California court delivered this precise message to Ford in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981), where the court stated that "it should have been clear [to Ford] that a manufacturer of a dangerous, defective product might be liable for punitive damages if it knowingly exposed others to the hazard." *Id.* at 811.

That is precisely what Ford did in this case. The Court of Appeal affirmed, as supported by substantial evidence, the jury's determination that Ford *knowingly* produced an automobile that (1) would roll over in normal driving conditions and on dry pavement if a driver swerved to avoid an obstacle; (2) had a roof so weak that it would collapse during a rollover; and (3) could easily have been made more stable and given a stronger roof through well-known, available and cost-effective design changes. Pet. App. 11a-16a, 52a-53a. Yet to avoid a few months' delay of the vehicle's release date and to increase its profits, Ford declined to make feasible and affordable design corrections urged by its own engineers. *Id.* at 12a-15a. Ford's Petition does not challenge these conclusions, nor

---

[6]Ford's argument, if accepted, would eviscerate state punitive damages statutes, with no readily available means of legislative repair. Punitive damages statutes are usually phrased as laws of general applicability, limiting the availability of punitive damages to cases of extreme reprehensibility. *See* p.13, *infra* (quoting the definitions of "malice" and "oppression" in California's punitive damages statute). What more could a legislature do to delineate the circumstances in which tortious conduct could justify an award of punitive damages?

could it. Indeed, Ford's own lawyer admitted to the jury that Ford "knowingly put a defective product out on the market and caused the family tragedy that you see before you now." RT8512-13.

For the reasons that follow, Ford was given ample notice that such conduct could give rise to liability under California's punitive damages law.

A. California Law Gave Ford Ample Notice Of The Circumstances Under Which Punitive Damages Could Be Awarded.

California law carefully defines the circumstances in which punitive damages can be awarded. Section 3294(a) of the California Civil Code (Pet. App. 224a) requires "clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." It defines "malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." CAL. CIV. CODE §3294(c)(1). It defines "oppression" as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." *Id.* §3294(c)(2). In accordance with the statute and California precedent (*see, e.g., Coll. Hosp., Inc. v. Superior Court*, 8 Cal. 4th 704, 721 (1994)), the jury was instructed that the *sine qua non* for either malice or oppression—"despicable conduct"—is "conduct that is so mean, vile, base or contemptible that it would be looked down on and despised by reasonable people." RT8281. These restrictive standards were the result of legislation adopted in 1987 for the purpose of limiting the availability of punitive damages; they "represent[ed] a new substantive limitation on punitive damage awards." *Coll. Hosp., Inc.*, 8 Cal. 4th at 725.

Ford made the design decisions affecting Petitioner's Explorer between 1989 and 1997. Pet. App. 12a-16a. By that time, Ford had received more than ample notice, directly from

the California courts, that knowingly designing and selling a defective product that could kill or cause severe bodily injury—especially where the defect could have been corrected for a minimal cost—could give rise to liability for punitive damages. In *Grimshaw*, Ford had designed a product (the Pinto) that it knew would expose consumers to risk of serious injury or death, a defect that it could have corrected at minimal cost. 119 Cal. App. 3d at 813. Ford argued that "its due process rights were violated because it did not have 'fair warning' that its conduct would render it liable for punitive damages." *Id.* at 811. *Grimshaw* rejected this contention, relying on cases dating back to 1941 holding that punitive damages were recoverable "where the defendant's conduct constitutes a conscious disregard of the probability of injury to others." *Id.* In particular, the court stated that since the decision in *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (1967), "it should have been clear [to Ford] that a manufacturer of a dangerous, defective product might be liable for punitive damages if it knowingly exposed others to the hazard." *Id.*[7]

Grimshaw is not the only California case that has held Ford liable for knowingly designing and selling dangerous automobiles in conscious disregard of the safety of consumers. *See Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402-03 (1982) (substantial evidence supported award of punitive damages where Ford knew about failing brakes on a vehicle

---

[7]In *Grimshaw*, the court said that Ford "knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20- to 30-mile-per-hour collision" and that "Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings" for financial reasons. 119 Cal. App. 3d at 813. "Ford's institutional mentality was shown to be one of callous indifference to public safety." *Id.* History does indeed repeat itself, as the cases discussed in the text following and the findings of the Court of Appeal in this case make all too clear.

but deliberately failed either to warn consumers or adopt remedial measures); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738, 755 (2003) (Ford held subject to punitive damages after designing a flawed roof that crushed people during rollovers and declining to strength-test the roof; Ford's conduct was "highly reprehensible" in that its "nonaccidental, malicious conduct" of knowingly placing a flawed product with consumers showed "reckless disregard of consumers' safety and lives").

Nor could Ford reasonably have believed that compliance with federal government safety regulations would preclude punitive damages. 49 U.S.C. §30103(e) provides that "[c]ompliance with a motor vehicle safety standard . . . does not exempt a person from liability at common law." Moreover, *Grimshaw* had already held that punitive damages were necessary to deter wrongful conduct because "[g]overnmental safety standards . . . have failed to provide adequate consumer protection against the manufacture and distribution of defective products." 119 Cal. App. 3d at 810. There was no ambiguity in California law on this point.[8]

Accordingly, Ford had every reason to know long before it designed and marketed the Explorer that designing an automobile with known dangerous defects posing a serious threat to human life and health—such as the deadly combination of a propensity to roll *and* a weak roof structure—and rejecting low-cost, safer alternatives could lead to punitive damages.

---

[8]Similarly, as the Court of Appeal noted, no prior California case had held that "expert disputes concerning design provide a defense to punitive damage liability." Pet App. 55a. There was no ambiguity in California law on this point either.

B. Ford Does Not Make (And Has Not Preserved) A Substantive Due Process Argument, And *Amici* Therefore May Not Do So.

It is important to distinguish Ford's vagueness theory from a contention—which certain *amici* attempt to advance—that the imposition of punitive damages in this case violates substantive Due Process because Ford assertedly complied with applicable laws and regulations and at least some paid experts defended the Explorer's design. Brf. of DRI at 10-22; Brf. of Product Liability Advisory Council, Inc. at 2-13; Brf. of Alliance of Automobile Mfgs. at 12-21; Brf. of Chamber of Commerce at 2-11. That substantive Due Process argument improperly goes beyond the vagueness/fair notice argument that Ford *does* make. *Amici* cannot expand the issue(s) raised by Ford's Petition. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

Moreover, a substantive Due Process claim could not properly have been asserted by Ford (and, *a fortiori*, cannot properly be raised by *amici*) because that Due Process argument was never made by Ford in the state court briefing. Ford *did* argue below that, *as a matter of California law*, regulatory compliance and/or the existence of a dispute among experts precluded the imposition of punitive damages. The Court of Appeal understood this as a state law issue, and rejected Ford's (and *amici's*) arguments. Pet. App. 52a-61a. Ford then re-raised those arguments in its Petition for Review, but again did so only as contentions of California law.[9] *See* Petition for Review 25-32, *Buell-Wilson v. Ford Motor Co.*, No. S146150 (Cal. S. Ct. Aug. 28, 2006).

In any event, even if—*arguendo*—a plausible argument could be made that the Constitution prohibits punitive damages where the defendant's conduct complied with federal

---

[9]Neither Ford nor any of the *amici* even attempt to show that any such substantive Due Process contention was presented to the California courts.

regulations, or where reasonable experts might disagree, that would be a problem of overbreadth, not vagueness, which would be corrected by an appropriate instruction, if requested. Such an instruction would inform the jury that if it found that the defendant had complied with all applicable regulations, or if it found that reasonable experts might disagree as to the lawfulness of the defendant's conduct, no punitive damages could be imposed. *See Williams I*, 549 U.S. at 355.[10] Ford failed to propose an instruction on the first of these points. It did propose an instruction on the second point (AA346), which the trial court rejected as erroneous.[11] Yet, as the Court of Appeal held, *Ford's appeal did not raise any failure-to-instruct issue* (and neither did its original Petition for Review). As a result, Ford has forfeited the right to raise such an issue now. Pet. App. 95a-96a.[12]

---

[10]*Amici* presume that the facts supporting their contentions of expert disagreement and regulatory compliance are undisputed and established, and therefore assume that the Court could reverse the judgment if it accepted their substantive Due Process argument. That assumption is incorrect. To begin with, there is no federal regulatory standard for vehicle stability. Pet. App. 60a. As for the roof strength defect, there is a federal regulation, but there was a factual dispute as to whether this vehicle did comply with applicable regulations. *See* RT2136:24-2137:8, 2141:26-2142:13; AA2621 (evidence that Ford cheated on the FMVSS 216 roof crush test); RT1986:3-23, 2131:4-2132:10 (evidence that many Explorers on the road are not strong enough to pass test). The Court must assume that the jury resolved that dispute against Ford. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996).

[11]Ford's description of its "reasonable people could disagree" instruction is misleading. The passage quoted in the Petition (at 4-5) was in the second sentence of a longer instruction. AA346. But the trial court rejected as erroneous the *first* sentence of the instruction, which Ford has not quoted. RT8134:13-26.

[12]Any such argument would have been meritless. The jury was correctly instructed that it could not award punitive damages unless it found that Ford's conduct was objectively "despicable." *See* p.13, *supra*.

(continued . . .)

C. Ford's "Vagueness/Fair Notice" Claim Has No Support In This Court's Cases.

Ford cites to many of the Court's vagueness opinions involving dissimilar statutes applied in dissimilar contexts. Pet. 21-24. But the "rules against vagueness are not 'mechanically applied,' but depend in their application, on 'the nature of the enactment.'" *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 316 (1994) (citation omitted). That principle matters here, because all the factors which this Court has listed in describing the cases in which vagueness scrutiny is most relaxed are present in this case: this case involves "economic regulation," "civil rather than criminal penalties," and an applicable "scienter requirement." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

Consequently, the most relevant vagueness cases are those which, inexplicably, Ford ignores: the Court's recent decisions *rejecting* similar vagueness challenges to punitive damages laws far less specific than California's. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 465-66 (1993) (plurality opinion) ("the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20, 24 n.12 (1991)[13]; *Smith v. Wade*,

---

(. . . continued)

In deciding whether Ford's conduct met this standard, the jury could consider Ford's evidence of regulatory compliance and expert debate. Ford was therefore free to—and did—present such evidence, and to use that evidence in argument to urge the jury not to award punitive damages. *See* p.21, *infra*.

[13]Justice O'Connor dissented in *Haslip*, arguing that Alabama's punitive damages law—which was implemented by an instruction telling the jury that "[i]mposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels

(continued . . .)

461 U.S. 30, 49, 51 (1983) (rejecting vagueness challenge to punitive damages award against prison guard on the ground that actual intent was not required and that punitive damages could be awarded for reckless or callous indifference: "[W]e are not persuaded that a recklessness standard is too vague to be fair or useful"; recklessness "was sufficient to trigger a jury's consideration of the appropriateness of punitive damages"). While ignoring these three cases that reject a vagueness challenge, Ford cites no case holding a punitive damages statute unconstitutionally vague, either on its face or as applied.

Nor do this Court's cases establish any general rule that "if reasonable people can disagree about whether particular conduct is prohibited by a statute, the fair notice required by due process is absent." Pet. 21. For example, *Colautti v. Franklin*, 439 U.S. 379 (1979), holds that a state statute regulating permissible methods of abortion was impermissibly vague where, *inter alia*, it did not contain a *mens rea* or *scienter* requirement, and therefore could be used to punish doctors who made good faith medical decisions regarding the medically appropriate abortion procedure in a particular case. *See id.* at 401; *see also Village of Hoffman Estates*, 455 U.S. at 499 ("the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed").

These cases are of no help to Ford because, under California law, "an award of punitive damages first requires a finding of scienter—malice, fraud, or oppression." *Roman Catholic Bishop v. Superior Court*, 128 Cal. App. 4th 1155, 1171 (2005). And as already shown, it was also necessary for

---

(. . . continued)

that you should do so" (*see* 499 U.S. at 6 n.1)—was void for vagueness. *Id.* at 42-53. No other member of the Court joined that dissent.

Plaintiffs to prove that Ford's conduct was "despicable" in the sense that it was "so mean, vile, base or contemptible that it would be looked down on and despised by reasonable people." *See* p.13, *supra*.[14]

In the absence of punitive damages cases directly on point, or even cases in other contexts that would support its vagueness theory, Ford is forced to rely heavily on a case that does not address the constitutional issue of vagueness at all, and admittedly involves "an issue of statutory interpretation and not a due process challenge." Pet. 23. *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), concerns the interpretation of a federal statute authorizing punitive damages for "willful" violations. *See id.* at 52. The Court held that "willful" misconduct includes "reckless disregard" of statutory duties and that if a defendant's interpretation of the statute is "not objectively unreasonable," its reliance on that interpretation is not "reckless" within the statute's meaning. *Id.* at 69.

The Court's interpretation of this federal statute says nothing about whether California's punitive damages statute was unconstitutionally vague as applied in this case. To begin with, the Court has already held that recklessness is not an unconstitutionally vague standard for imposing punitive damages liability. *Smith*, 461 U.S. at 49-51. Moreover, *Safeco*'s

---

[14]The remaining cases Ford cites are no more relevant. *Connally v. General Construction Co.*, 269 U.S. 385 (1926), does not hold that a statute is unconstitutionally vague if its interpretation depends on the "probably varying impressions of jurors" (Pet. 21-22 (citing 269 U.S. at 395)), but only that a statute is unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning." *Id.* at 391. *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915), holds only that a statutory penalty could not be imposed against a company where "[t]here was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct" (*id.* at 490)—*i.e.*, conduct poles apart from Ford's actions in this case.

analysis is inapposite. In that case, the question of whether the defendants' misinterpretation of an admittedly ambiguous statutory term was reckless, as the statute required, was a pure issue of law to be decided by the courts. In contrast, whether Ford knew that the Explorer posed a high risk of causing physical harm was a question of fact to be decided by a jury. As noted, Ford was free to—and did—argue to the jury that it was not guilty of oppression, fraud, or malice and to support this claim by presenting evidence of regulatory compliance and any good-faith expert debate. *See, e.g.*, AA528-35; AA2618-56; RT1723-36; RT5145, 5179 (regulatory compliance); RT5152-54, 5164-67; AA716-19, 756 (expert disagreement).[15] It was also free to use that evidence to argue that no punitive damages should be awarded. But as long as a reasonable jury could reject this evidence, and find that Ford's conduct met California's well-established criteria for awarding punitive damages, nothing in *Safeco* prevented the jury from resolving this factual issue adversely to it.

The "qualified immunity" cases cited by Ford (*see* Pet. 23-24) are also irrelevant. Those cases have nothing to do with vagueness. Instead, they turn on a substantive rule that public officials are only liable for unconstitutional actions when their conduct violated "clearly established" legal principles. Ford makes no claim in its Petition that, as a matter of substantive constitutional law, punitive damages can only be awarded when the defendant's conduct violated "clearly established" legal principles. Its contention is only that California law was unconstitutionally vague, at least as applied to the

---

[15]The statement of some *amici* (*e.g.*, Brf. of DRI at 4 (emphasis in original)) that under the decision below, "compliance with federal, state, and industry standards is *irrelevant* to the imposition of punitive damages," is false. If it had been irrelevant, evidence on those issues would have been excluded. In fact, the decision holds only that such compliance is not an absolute bar to punitive damages. Pet. App. 56a-61a.

facts of this case. The qualified immunity cases have nothing relevant to say on that issue.

D. There Is No Conflict In The Cases.

Ford purports to find conflicts everywhere—between the decision in this case and decisions of this Court; decisions of other state and federal courts that have addressed "vagueness as-applied" challenges to punitive damages awards; and the general methodology used by the courts in evaluating such claims. None of the claimed conflicts is real.

1. There is no conflict with respect to the only issue presented by the Petition. As noted above, no case strikes down a punitive damages statute as unconstitutionally vague (either on its face or as applied) merely because *some* but not *all* reasonable people (or, as in this case, paid experts testifying after-the-fact) would find the defendant's conduct lawful or because the defendant's product complied with applicable regulatory standards.

2. Ford nevertheless argues that certiorari is warranted because of a supposed conflict in the lower courts because some decisions purportedly refuse to consider as-applied challenges to punitive damages awards once a facial challenge to the statute has been rejected. Pet. 10-19. Ford is wrong. No state or federal case has ever held that as-applied vagueness challenges are barred if a statute is not facially invalid.

This includes the decision below. Ford claims that the Court of Appeal "effectively refused to entertain Ford's as-applied vagueness challenge because a 1981 decision had found California's punitive damages statute to be facially valid." Pet. 3. This is incorrect. In the first place, that 1981 case included an "as-applied" challenge, which the Court of Appeal rejected. *See Grimshaw*, 119 Cal. App. 3d at 811. Moreover, the opinion in the present case did not refuse to entertain an as-applied challenge or ignore the particular facts

of this case. Ford's claims to the contrary rest on both a mischaracterization of what the Court of Appeal said and a truncated quotation from its opinion. In fact, in the third paragraph of the opinion quoted in the footnote below, which Ford omits from its Petition (*see* Pet. 6), the Court of Appeal rejected Ford's as-applied claim on the merits.[16] Ford's assertion that the California Court of Appeal "rejected Ford's vagueness challenge simply because other courts had rejected vagueness challenges in other cases involving different facts" (Pet. 18) is false.

Ford's contention that the California courts refuse to entertain as-applied vagueness challenges to punitive damages awards (*see* Pet. 11-12) is also false. The only vagueness challenge in *Bertero v. National General Corp.*, 13 Cal. 3d 43 (1974), was a facial one: the defendant contended that the California punitive damages statute was unconstitutionally vague "because it fails to provide sufficient guidance for the

---

[16]Here is what the Court of Appeal said in rejecting Ford's vagueness claim:

> Ford contends that if punitive damages can be awarded on this record, Civil Code section 3294 is unconstitutionally vague because it failed to give Ford fair notice that its conduct could subject it to punitive damages. This contention is also unavailing.
>
> Ford made this same argument over 25 years ago in *Grimshaw, supra*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348. The Court of Appeal rejected it, concluding that "punitive damages are recoverable in a nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others." (*Id.* at p.811, 174 Cal.Rptr. 348.)
>
> *Additionally, Ford bases this contention on the fact that, at most, reasonable people could disagree with the decisions it made. However, we have already discussed and rejected this argument, ante.* (Pet. App. 61a-62a (emphasis added))

trial courts charged with implementing it." *Id.* at 66 n.13. Similarly, while constitutional challenges to California's punitive damages statute were dismissed out of hand in *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n.2 (1982), nothing in the decision indicates that the constitutional challenges were based on vagueness, much less as-applied vagueness. Finally, *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal. 3d 809, 819 (1979), did not reject constitutional challenges at all; the court merely noted that the proposition that California's punitive damages statute was unconstitutional had been "frequently rejected" in other cases. In fact, *no* California decision "effectively preclude[s] California courts from considering as-applied vagueness challenges to California's punitive damages statute" (Pet. 12)—as the decision below irrefutably demonstrates. *See* pp.22-23, *supra*.[17]

---

[17]The same is true for the non-California cases that Ford contends have followed the same approach that Ford mistakenly ascribes to California. Pet. 12. The only vagueness argument advanced in *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984), was that Colorado's punitive damages statutes suffered from "facial vagueness." *Id.* at 214. The court therefore had no reason to address whether the statute was unconstitutionally vague as applied. Nor was an as-applied vagueness challenge made in *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979), *overruled on other grounds*, *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985). Instead, defendant again raised only a challenge based on facial vagueness, contending that Alaska's punitive damages statute gave "the jury . . . no standards by which to determine the extent of a defendant's culpability and the amount of damages to be assessed." *Id.* at 46. Likewise, in *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989), the defendant claimed only that North Dakota's punitive damages statute was "void for vagueness" because "the 'vagueness' of the proscribed conduct, coupled with the 'lack of objective guidelines by which to set the amount of punishment,' results in 'arbitrary punishment'" in violation of [the Due Process Clause]." *Id.* at 755. Accordingly, none of these decisions involves a refusal by the state courts to address an "as applied" vagueness challenge to application of a state punitive damages statute.

Ford's constitutional "vagueness/fair notice" claim is premised on

(continued . . .)

For these reasons, neither the decision below nor the other state court cases Ford cites conflict with the cases Ford identifies as having followed the correct approach to resolving as-applied vagueness challenges. Pet. 15-17. No jurisdiction—and certainly not California—has "forever insulated" punitive damages awards from "as-applied vagueness challenges regardless of the conduct at issue." Pet. 16. To the contrary, the California courts, like the courts in other states, remain open for consideration of such claims.

3. Ford also contends that certiorari should be granted to "clarify the legal standard that courts should apply when deciding as-applied challenges to punitive damages statutes." Pet. 19. It argues that such clarification is necessary because of a supposed conflict in decisions that adjudicate as-applied vagueness challenges. Ford says that some courts permit punitive damages if "reasonable persons could conclude the conduct at issue was unlawful . . . even if reasonable persons could also conclude the conduct was lawful." *Id.* In contrast, other courts supposedly "hold that as-applied vagueness challenges fail only where reasonable persons could *not* conclude the conduct was lawful." *Id.* (emphasis in original).

This supposed conflict is a fiction. *None* of the cases Ford cites to support this supposed conflict involves claims for punitive damages.[18] Moreover, *none* of these cases

---

(. . . continued)

the assertion that at least some persons would have found its conduct reasonable in light of federal automotive safety standards, "ongoing genuine debate in the engineering community," etc. Pet. 7. No similar claim of constitutional dimension was made in *any* of the other state court cases Ford cites in trying to show the existence of a widespread conflict. *None* of the defendants in *Palmer*, *Day* or *Stoner* attempted to show that their conduct was "objectively reasonable" so as to preclude the availability of punitive damages on an as-applied constitutional "vagueness/fair notice" theory.

[18] *Barber v. Jefferson County Racing Ass'n*, 960 So. 2d 599 (Ala.

(continued . . .)

discusses the objective reasonableness of *any* litigant's conduct, much less addresses whether punitive damages (or, indeed, any other civil or criminal penalties) are permissible even if some reasonable persons would conclude that the defendant's conduct was lawful. Accordingly, none of these cases supports Ford's Petition.

That leaves Ford with two Fifth Circuit cases, which similarly do not involve punitive damages. Both *S&H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Commission*, 659 F.2d 1273 (5th Cir. 1981), and *B&B Insulation, Inc. v. Occupational Safety & Health Review Commission*, 583 F.2d 1364 (5th Cir. 1978), interpreted an OSHA regulation that, *inter alia*, made employers responsible for "requiring the wearing of appropriate personal protective equipment in all occupations where there is an exposure to hazardous conditions." 29 C.F.R. §1926.28(a).

B&B Insulation held that this regulation could be enforced against an employer only as applied to "conditions which the cited employer's industry would recognize as hazards requiring the use of safety equipment." 583 F.2d at 1366.

(. . . continued)

2006), *cert. denied*, 551 U.S. 1131 (2007), holds that the state's criminal gaming law was not unconstitutionally vague as applied to the defendants' attempt to operate slot machine-like devices at their racetracks. *State v. Thirteenth Judicial District Court*, 208 P.3d 408 (Mont. 2009), similarly holds that a state statute making it a crime to leave the scene of an automobile accident involving death or injury was not unconstitutionally vague as applied. *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009), holds that a state's campaign disclosure law was unconstitutionally vague as applied to activities that resulted in no detriment to the putative donor and had no market value. And *Haggblom v. City of Dillingham*, 191 P.3d 991 (Alaska 2008), held that a city ordinance requiring the euthanasia of dogs that had bitten a person without provocation was not unconstitutionally vague where the conduct of plaintiff's dog fell within the "hard core" of the conduct prohibited by the ordinance. *Id.* at 997 n.21.

In so holding, the court first recognized that the regulation incorporated a tort law "reasonable man" standard, pursuant to which "evidence of customary conduct of those similarly situated may be probative in determining his behavior." *Id.* at 1370. However, the court then went on to demand "a closer identification between the projected behavior of the reasonable man and the customary practice of employers in the industry" than is found in tort law. *Id.* The court gave two reasons for its departure from tort concepts of reasonableness. First, unlike the tort system, "the purpose of the [Occupational Safety and Health Act] is preventive rather than compensatory." *Id.* at 1370-71. Moreover, the Congress that enacted the Act "thought specificity of standards desirable." *Id.* at 1371. Consequently, as the Fifth Circuit later stated in *S&H Riggers*, the *B&B Insulation* court "concluded . . . that rigid application of the tort law concept [of the reasonable person standard] would be inconsistent with the preventive goals of OSHA and Congress's expressed preference for specific rather than general standards." *S&H Riggers & Erectors*, 659 F.2d at 1277. *S&H Riggers* confirmed *B&B Insulation*, but added an additional ground for holding an employer liable for violating the OSHA regulation in question—where the employer has "actual knowledge that personal protective equipment is required for employee safety." 659 F.2d at 1281.[19]

These two Fifth Circuit cases are irrelevant here, for multiple reasons. First, these cases interpreted a new federal regulation that was so vague that "no two members of the [Occupational Safety and Health Review] Commission had ever reached agreement on the regulation's meaning." *S&H Riggers*, 659 F.2d at 1281. In contrast, this case concerns a long-standing state statute, whose operative terms are not only

---

[19]Ford states that this exception does not apply if the employer "could reasonably conclude that additional . . . protection was not necessary." Pet. 21 (purporting to quote 659 F.2d at 1283). No such language appears in the opinion.

defined in the statute itself but have also been the subject of innumerable judicial decisions that have elaborated its meaning in situations very much like those presented here. *See* pp.14-15, *supra*. This makes all the difference; indeed, even *S&H Riggers* recognized that the "reasonable person standard" is "'one of the rudimentary precepts of our law'" and concluded that "[p]ossibly a reasonable person standard that does not accept industry practice as controlling can give employers adequate notice of the requirements of [the OSHA regulation]." 659 F.2d at 1280 (citation omitted). Moreover, the courts in *B&B Insulation* and *S&H Riggers* knowingly departed from common law standards of notice to further OSHA's "preventive purpose and the intended specificity of its standards" (583 F.2d at 1371), concerns that have no place in implementing common law rules. For these reasons, Ford cannot cite a single case—and there is none—that has relied on these Fifth Circuit decisions in addressing a constitutional due process/"fair notice" challenge to a punitive damages award.[20]

---

[20]Even if the rules promulgated by the Fifth Circuit in the two OSHA cases could be shoehorned wholesale into the quite different domain of punitive damages Ford would not be helped. As noted above, *S&H Riggers* expressly permits the imposition of administrative penalties where the employer had "actual knowledge" that safety equipment was required. *See* 659 F.2d at 1283. That principle forecloses any "fair notice" claim here. As the Court of Appeal found, Ford knew that the Explorer was dangerously unstable and prone to rollover in normal driving conditions; knew that the roof structure was weak and prone to collapse in a rollover; and knew of technologically and economically feasible ways to stabilize the vehicle and strengthen its roof that it rejected for financial reasons. Pet. App. 52a-54a.

CONCLUSION

The Petition should be denied.

Respectfully,

JEROME B. FALK, JR.
Counsel of Record
STEVEN L. MAYER
JOHN P. DUCHEMIN
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation

DENNIS A. SCHOVILLE
LOUIS G. ARNELL
SCHOVILLE & ARNELL, LLP

APPENDIX

APPENDIX

IN THE
SUPREME COURT OF CALIFORNIA

BENETTA BUELL-WILSON et al.,

Plaintiffs and Respondents,

v.

FORD MOTOR COMPANY, et al.

Defendants and Appellants.

After A Decision By The Court of Appeal,
Fourth Appellate District, Division I, Case Nos. D045154, D045579

San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

PETITION FOR REVIEW

THEODORE J. BOUTROUS, JR. (132099)
WILLIAM E. THOMSON (187912)
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Avenue, Suite 4700
Los Angeles, CA 90071
Tel: (213) 229-7000
Fax: (213) 229-7520

DANIEL M. KOLKEY (79102)
GIBSON, DUNN & CRUTCHER LLP
One Montgomery Street
San Francisco, CA 94104
Tel: (415) 393-8200
Fax: (415) 986-5309

THEODORE B. OLSON (038137)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
Telephone: (202) 955-8500
Facsimile: (202) 467 0539

Attorneys for Appellant
Ford Motor Company

TABLE OF CONTENTS

Page

ISSUES PRESENTED FOR REVIEW 1

WHY REVIEW SHOULD BE GRANTED 2

FACTUAL AND PROCEDURAL BACKGROUND 6

A. The Alleged Stability Defect 6

B. The Alleged Roof Defect 11

C. The Verdict And Appeal 12

DISCUSSION 13

I. This Court Should Grant Review To Secure Uniformity Of Decision Regarding The Admissibility Of Industry Standards and Custom In Design Defect Actions. 13

A. The Court Should Grant Review To Decide If Industry Standards and Custom Evidence Is Admissible On The Design Defect Issue 14

1. Such Evidence Is Relevant To Both Prongs Of The *Barker* Defect Inquiry 14

2. The Courts of Appeal Are Split On This Issue 19

3. The Court Of Appeal's Decision Contradicts The Restatement Third Of Torts 20

TABLE OF CONTENTS

Page

4. The Court Of Appeal's Decision Is Inconsistent With The Rule In The Majority Of Other States 20

B. The Court Should Also Grant Review To Make Clear That Such Evidence Is Admissible On Punitive Damage Issues 21

II This Court Should Grant Review To Address The Standards For Imposing Punitive Damages In Product Design Cases Under Section 3294 25

III. This Court Should Grant Review To Clarify The Standards For Scrutinizing Punitive Damages For Excessiveness Under The Due Process Clause In The Product Liability Context 32

A. Misinterpretation Of The *De Novo* Review Standard 33

B. Misinterpretation Of The Reprehensibility Guidepost 35

CONCLUSION 37

CERTIFICATION OF WORD COUNT 38

ISSUES PRESENTED FOR REVIEW

1. In a product liability design case, is evidence of industry standards and custom, including the product's real-world safety performance relative to comparable products, relevant to the issues of design defect and punitive damages?

2. In a product liability design case, can malice within the meaning of Civil Code section 3294 be deemed established by clear and convincing evidence against a motor vehicle manufacturer where (a) the vehicle complies with applicable federal standards that are required by law to "meet the need for motor vehicle safety," (b) the federal government has rejected the precise standards used by plaintiffs' expert to condemn the product as defective, (c) the vehicle is as safe or safer than comparable vehicles, and (d) there is an objectively reasonable, genuine debate over whether the product is defective?

3. In evaluating punitive damages pursuant to the federal due process *de novo* review standard, may a court (a) apply the state-law substantial evidence test to presume that the jury made findings it did not expressly make and to disregard objective factors mitigating reprehensibility, and (b) punish the manufacturer's lawful conduct, including its sale of a product to third parties not before the court, even where the manufacturer prevailed in the previous eleven cases involving that same product?

WHY REVIEW SHOULD BE GRANTED

The decision below creates new and draconian rules for product liability cases, including a virtual liability-without-fault standard for punitive damages. Unless reviewed and overturned, that decision will render it irrelevant that a manufacturer's design decisions resulted in a product that complies with industry standards and custom, comports with relevant federal safety standards and reasonable policy judgments, and performs as well or better than comparable competing products. In place of these knowable standards, the decision substitutes a vague regime that will permit tens of millions of dollars of punishments to be imposed if a jury deems a manufacturer's conduct "despicable" on the strength of nothing more than a finding that, as will almost always be the case, the product might possibly have been made "safer" if more money had been spent in making it. That is neither constitutional nor rational. Review is necessary to conform California's product liability and punitive damage law to reason, common sense, and the United States Constitution.

Before this product design trial, eleven Ford Explorer cases involving similar claims had gone to judgment, and in *all eleven* cases judgment was entered in favor of Ford Motor Company (hereafter "Ford"). (Appellant's Appendix 1154-1237 (hereafter "AA").) But in this case, the jury returned split verdicts finding that the Explorer was defective, and that Ford had acted with "malice" in designing it. The jury awarded an astonishing $368 million in compensatory and punitive damages.

Although the Court of Appeal found that the jury was inflamed by "passion and prejudice" and not acting as a "fair and neutral trier of fact" (*Buell-Wilson v. Ford Motor Company* (August 17, 2006, D045154, D045579) slip opinion, p. 37 (hereafter "slip opn.")), and thus reduced the

compensatory and punitive damages to $82.6 million, it otherwise affirmed the judgment. In so doing, the court declared that the jury was empowered to regulate automotive safety – even to the point of overriding the federal agency expressly charged by Congress with this responsibility – "because '[g]overnmental safety standards . . . have failed to provide adequate consumer protection.'" (*Id.*, pp. 49-50.) At the same time, in deciding three important issues of law, the court jettisoned as irrelevant the most reliable and objective information for making decisions about product design and safety.

First, the court held as a matter of law that industry standards and custom – including comparative accident statistics showing that the product was as safe or safer than comparable products – are "irrelevant not only to the issue of defect, but also to punitive damages." (Slip opn., p. 24.) This holding departs from the reasoning of *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413 (hereafter *Barker*), extends a split among the California courts of appeal, and places California at odds with the majority of other jurisdictions, as well as the Restatement Third of Torts, Product Liability. The court's ruling that it is "reversible error" (slip opn., p. 23) to allow introduction of such data regarding how products comparatively perform in the real world will preclude both plaintiffs and defendants from providing juries with the most crucial information – precisely the kind that actual governmental regulators themselves would rely on – for making decisions about public safety. (See *Daly v. Gen. Motors Corp.* (1978) 20 Cal.3d 725, 746 ["Product designs do not evolve in a vacuum, but must reflect the realities of the market place, kitchen, highway, and shop"]; *Bammerlin v. Navistar Int'l Transp. Corp.* (7th Cir. 1994) 30 F.3d 898, 901 ["Jurors are not engineers, and data on accident rates speak more loudly than abstract arguments"].)

Second, the court held that juries are authorized to deem a manufacturer's design decisions malicious, and impose severe punishment, even where undisputed, objective indicators – such as ongoing genuine debate in the engineering community, accident data showing the product is among the safest in its class, and governmental regulatory decisions confirming the manufacturer's judgment – affirmatively refute malice as a matter of law. This ruling contradicts California law, decisions from other jurisdictions, and due process. This issue is especially important because punitive damages "pose an acute danger of arbitrary deprivation of property." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-18 (hereafter *State Farm*).) The danger is heightened in design defect cases, which require jurors to second-guess complex policy judgments, in hindsight, regarding whether a product's utility outweighs its risks, and always in the context of an accident resulting in tragic personal injuries likely to provoke the jury's passion.

Third, the court misinterpreted the due-process excessiveness standards governing punitive damages. These standards require "exacting" *de novo* judicial scrutiny (see *State Farm*, *supra*, pp. 417-18), but the court conflated *de novo* review with state-law substantial evidence analysis and, as a result, declined to consider key objective factors in upholding a record-setting $55 million punishment. Instead, the court relied on factors condemned by *State Farm*, such as Explorer sales to consumers not before the court, even though Ford had prevailed in the eleven prior Explorer cases.

For these reasons, this Court should grant review.